

SUBJECT: Requiring state divestment from companies boycotting energy companies

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 12 ayes — Paddie, Hernandez, Deshotel, Harless, Hunter, P. King, Lucio, Metcalf, Raymond, Shaheen, Slawson, Smithee

1 nay — Howard

WITNESSES: For — Jason Modglin, Texas Alliance of Energy Producers; Brent Bennett, Texas Public Policy Foundation; Michael Belsick; James Lofton; (*Registered, but did not testify*: Caleb Troxclair, DoublePoint Energy; Kelly McBeth, Howard Energy Partners; Michael Lozano, Permian Basin Petroleum Association; Neftali Partida, Phillips 66; Danielle Delgadillo, Soth Texas Electric Coop; Ryan Paylor, Texas Independent Producers & Royalty Owners Association; Shana Joyce, Texas Oil and Gas Association; Russell Hayter; Thomas Parkinson; Gary Zimmerman)

Against — Robin Schneider, Texas Campaign for the Environment (*Registered, but did not testify*: Matt Simpson, ACLU of Texas; Jason Sabo, Environment Texas; Cyrus Reed, Lone Star Chapter Sierra Club; Joshua Houston, Texas Impact; and 13 individuals)

On — Whitney Blanton, Texas Treasury and Safekeeping Trust Company

DIGEST: CSHB 2189 would require state governmental entities to divest from financial companies that boycott energy companies, subject to certain conditions related to fiduciary duty.

Definitions. The bill would define "boycott energy company" as refusing to deal with, terminating business activities with, or otherwise taking any action that is, solely or primarily, intended to penalize, inflict economic harm on, or limit commercial relations with a company because it:

- engaged in the exploration, production, utilization, transportation, sale, or manufacturing of fossil fuel-based energy and does not

commit or pledge to meet environmental standards beyond applicable federal and state law, or;

- did business with a company that engaged in these actions.

"Financial company" would mean a publicly traded financial services, banking, or investment company.

"State governmental entity" would mean:

- the Employees Retirement System of Texas, including a retirement system administered by that system;
- the Teacher Retirement System of Texas;
- the Texas Municipal Retirement System;
- the Texas County and District Retirement System;
- the Texas Emergency Services Retirement System; and
- the Permanent School Fund.

"Indirect holdings" would mean, with respect to a financial company, all securities of a financial company held in an account or fund, such as a mutual fund managed by one or more persons not employed by a state governmental entity, in which the state governmental entity owns shares or interest together with other investors not subject to the provisions of the bill. The term does not include money invested under a plan described by Section 401(k) or 457 of the Internal Revenue Code of 1986.

List of boycotting companies. The comptroller would prepare and maintain a list of all financial companies that boycott energy companies. In maintaining the list, the comptroller would be able to review and rely on publicly available information and request written verification from a financial company that it does not boycott energy companies. The comptroller could rely on a written response without further investigation. A company that failed to provide such written verification before the 61st day after receiving the request from the comptroller would be presumed to be boycotting energy companies. The comptroller would update the list annually or more often but not more often than quarterly. No later than 30 days after the list was provided or updated, it would be filed by the

comptroller with the presiding officer of each legislative house and the attorney general and post the list on a publicly available website.

Divestment procedure. No later than 30 days after a state governmental entity received the list, the entity would notify the comptroller of any listed financial companies in which it owned direct or indirect holdings. For each listed financial company so identified, the entity would send a written notice:

- informing the company of its listed status;
- warning the company of possible divestment;
- offering the company the opportunity to clarify its activities related to the boycotting of energy companies.

Financial companies would be required to cease boycotting energy companies no later than 90 days after receiving such notice in order to avoid qualifying for divestment by state governmental entities. If during this period a financial company ceased boycotting energy companies, the comptroller would remove it from the list. If a financial company continued boycotting energy companies, state government entities would be required to sell, redeem, divest, or withdraw all publicly traded securities of the financial company.

At least 50 percent of these assets would have to be removed no later than 180 days after the financial company received notice, and 100 percent no later than 360 days after notice. The initial 50 percent divestment could be delayed if the state entity determined that a later date would be more prudent; otherwise the entity could delay only to the extent that it determined that divestment would likely result in a loss in value or a benchmark deviation. Any entity delaying under such conditions would be required to submit an explanatory report, including supporting documentation with objective numerical estimates, to the leader of each legislative house and the attorney general. The entity would have to update the report every 6 months.

Indirect holdings exempted. State governmental entities would not be

required to divest from indirect holdings, but would be required to send letters to the managers of each investment fund containing listed financial companies requesting that they remove those companies from the fund or create a similar fund without such financial companies, in which the state entity could replace its investments no later than 450 days after the fund's creation.

Other exemptions. A state governmental entity would be able to cease divesting from listed financial companies only if clear evidence showed that the entity had suffered or would suffer a value loss of managed assets or benchmark deviation of an individual portfolio due to divestment. State governmental entities would only be allowed to cease divesting to the extent needed to avoid a value loss or benchmark deviation, and otherwise would be prohibited from acquiring securities of a listed financial company. Before ceasing divesting from a listed company, the entity would have to provide a written explanatory report, including supporting evidence, to the comptroller, the leader of each legislative house, and the attorney general. The entity would update the report semiannually.

A state governmental entity would not be subject to a requirement of the bill if the entity determined that the requirement would be inconsistent with its fiduciary responsibility with respect to the investment of assets and related legal duties.

Report. No later than January 5 of each year, each state governmental entity would file a publicly available report with the leader of each legislative house and the attorney general that would identify all divestments, prohibited investments, and changes made under the provisions of this bill.

Contracts with boycotting companies prohibited. A state agency or political subdivision would be prohibited from entering a contract for goods and services with any company without written verification in the contract that the company did not boycott energy companies and would not do so during the term of the contract. This prohibition would not apply to contracts with sole proprietorships and would apply only to contracts

with a company with 10 or more employees and a value of \$100,000 or more that is to be paid wholly or partly from public funds of the state agency or subdivision. The bill's provisions would apply only to contracts entered into on or after the effective date.

Legal exemptions and indemnity. CSHB 2189 would exempt the comptroller and state governmental entities from any conflicting statutory or common law obligation with regard to actions taken in compliance with the bill's provisions. In causes of action arising under the provisions of the bill, the state would indemnify state governmental entities, their employees, officers, and contractors, and their former employees, officers, and contractors who were such when the act or omission on which the damages were based occurred. Pursuit of a private cause of action based on the provisions of the bill would be prohibited, and any person attempting such a suit would be liable for the costs and attorney's fees of the person sued.

Enforcement. The attorney general could bring any action necessary to enforce the bill's provisions regarding investments by state governmental entities.

The bill would take effect September 1, 2021.

**SUPPORTERS
SAY:**

CSHB 2189 would help protect the state's investments and the overall economic health of Texas by requiring state entities to divest as much as possible from companies that unfairly target energy producers. The politically motivated movement to deny capital to businesses involved in the fossil fuel industry will harm the state's economy. The oil and gas industry is responsible for nearly one-third of the state's gross domestic product, contributes billions to schools, infrastructure, and the rainy day fund, and provides many high-paying jobs in rural areas. Texas funds and taxpayer dollars should not be used to do business with companies whose policies undermine the economic success of the state by making needed energy less affordable and less secure.

CSHB 2189 would ensure the stability of the state's investments by only

requiring divestment that would not result in a loss of value or breach of fiduciary duty. The oil and gas industry is a vital sector of the Texas economy and realistically will remain so for the foreseeable future, so standing up to financial discrimination against the industry is in the state's best interests. By divesting from boycotting companies, the state would simply be exercising the same right to make investment decisions that those companies are exercising by boycotting energy providers. The bill would not prevent but would actually encourage the state to seek out the best available investments.

The process of creating the list required by the bill would not be onerous and could be contracted to a third party vendor. Any cost associated with creating the list is justified by the need to remove, whenever possible, state business from companies that unfairly target an industry vital to Texas' economic success.

The bill would not impose any legal restrictions on speech, political activity, or investment decisions, so it would not violate the First Amendment rights of any company. The provisions of the bill would exercise the state's right to do business or not with whichever companies it chooses.

**CRITICS
SAY:**

CSHB 2189 would endanger the health of state retirement funds and hinder the long-term growth prospects of the state's economy by limiting the state's investment options. The financial market is moving toward increased divestment from fossil fuels for sound economic reasons and will continue to do so into the future. Meanwhile, oil and gas are economically underperforming relative to other industries. Texas should be looking to capitalize on these market trends rather than resisting them. In order to remain business-friendly, the state should not attempt to pressure or penalize companies for their investment decisions but should seek out the best investments available.

Unlike previous state divestment efforts, CSHB 2189 would require a list of companies that does not already exist. Creating and maintaining this list would entail administrative overhead and waste taxpayer money,

especially if state entities ultimately remain invested in listed companies, making the list little more than a symbolic gesture.

OTHER
CRITICS
SAY:

The purchasing decisions of companies often reflect their political beliefs and values. By forcing companies to choose between expressing their beliefs and their ability to contract with the state, CSHB 2189 would infringe on their First Amendment rights.

NOTES:

According to the Legislative Budget Board, the fiscal impact of provisions that would prohibit state governmental entities from investing in financial companies that boycott energy companies and prohibit certain governmental entities from executing contracts with the same companies cannot be determined.